RECENT DECISIONS

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ATTACHMENT—MOTION TO VACATE—SUBMITTING NEW PROOF IN SUPPORT OF WARRANT.—*K* pledged to the appellant bank a non-negotiable warehouse receipt, no notice of the pledge being given to the warehouse at the time. Thereafter, the plaintiff obtained an attachment against *K* and levied it on the goods. Subsequently notice of the pledge was given to the warehouse. Thereupon the bank moved to vacate the attachment upon the ground that the papers in support thereof did not show a cause of action. The moving papers were confined to showing the bank's lien. *Held,* that the plaintiff might not, in opposition to the motion, submit new affidavits in support of the attachment. *California Packing Corporation* v. *Phoenix & Third National Bank* (App. Div., 1st Dept., June 13, 1919, not yet reported.)

When a motion is made to vacate an attachment upon new proofs, the plaintiff is, by express statutory provision, entitled to submit new affidavits in support of his attachment. Code Civ. Proc., § 683. When the motion was made solely upon the papers upon which the attachment was granted, however, it was held prior to 1911 that the plaintiff had no such right. *Hilborn* v. *Pennsylvania Cement Co.* (1911) 145 App. Div. 442, 129 N. Y. Supp. 957; *Ladenburg* v. *Commercial Bank* (1895) 87 Hun 269, 33 N. Y. Supp. 821, *aff'd.* 146 N. Y. 406, 42 N. E. 543. And where a motion by a junior lienor was made upon papers setting forth only the moving party's lien, it was deemed made solely upon the papers upon which the warrant was granted. *Trow's Printing, etc. Co.* v. *Hart* (1881) 85 N. Y. 500; *Steuben County Bank* v. *Alberger* (1879) 75 N. Y. 179. Nor was the court allowed to "amend" the papers under Code Civ. Proc. § 723, for an affidavit cannot be amended by the court. *Davis* v. *Reflex Camera Co.* (1904) 97 App. Div. 73, 89 N. Y. Supp. 587. In 1911, Code Civ. Proc. § 768 was amended so as to authorize the filing of new affidavits in support of any "order, judgment or decree or any paper filed or proceeding taken" attacked on the ground of the insufficiency of the papers in support thereof, where this can be done "without prejudice to intervening rights". This provision has been held to apply to attachments. *Cutler* v. *Allavena* (1914) 165 App. Div. 422, 150 N. Y. Supp. 790. The court in the principal case rightly held that the provision did not apply, because in that case the filing of new affidavits in support of the attachment would have prejudiced the intervening rights of the bank.

CARRIERS—INADVERTENT MISDESCRIPTION OF GOODS—LIABILITY FOR LOSS.—Due to an inadvertent misdescription by a shipper's agent, a case of furs, so marked, was described in the bill of lading as containing dry goods; consequently the shipper was charged at the lower scheduled rate applicable to the latter, instead of at the higher rate

applicable to furs. No valuation was placed upon the goods, which were stolen in the course of an interstate shipment. *Held,* the carrier was liable for the value of the furs. *New York Central R. R.* v. *Goldberg* (U. S. Sup. Ct., Oct. Term 1918, No. 256, May 19, 1919).

A shipper is bound by his agent's misrepresentation as to the nature or value of goods shipped, *Harrington* v. *Wabash R. R.* (1909) 108 Minn. 257, 122 N. W. 14, and it is immaterial, Hutchinson, Carriers (3rd ed.) § 330, as affecting the carrier's liability, whether a misrepresentation is made fraudulently, *Chicago & A. R. R.* v. *Shea* (1873) 66 Ill. 471; see *Chicago etc. R. R.* v. *Thompson* (1858) 19 Ill. 578, or innocently. *Bottum* v. *Charleston & W. C. Ry.* (1905) 72 S. C. 375, 51 S. E. 985. If the carrier relies thereon and in consequence thereof omits some precaution which, if taken, might have prevented the loss, *Southern Exp. Co.* v. *Wood* (1896) 98 Ga. 268, 25 S. E. 436, it is relieved from liability to the extent of the deception; *Bottum* v. *Charleston & W. C. Ry., supra; Chicago & A. R. R.* v. *Shea supra;* although a contrary view, *Head* v. *Pacific Exp. Co.* (1910) 60 Tex. Civ. App. 169, 126 S. W. 682, rests on the theory that a bailee is liable for the value of the goods actually held, when loss occurs through his failure to exercise care commensurate with their apparent character. But if the deception does not contribute to the loss or damage, *Mobile etc. R. R.* v. *Phillips & Co.* (1912) 103 Miss. 536, 60 So. 572; *Chesapeake & O. Ry.* v. *Magowan* (1912) 147 Ky. 422, 144 S. W. 80, the carrier is held liable notwithstanding the deception. Because of the comprehensiveness of the classification "dry goods," it is speculative whether a proper description of the shipment in the instant case might have increased the carrier's vigilance or decreased the risk. Assuming that such would have been the case, it might be urged in support of the court's holding that the common carrier's obligation as insurer is imposed by law independently of contract. See *Johnson etc.* v. *East Tenn. etc. R. R.* (1892) 90 Ga. 810, 17 S. E. 121. But it would seem that the law may consistently create such liability and at the same time limit its application to the kind of merchandise described in the bill of lading, because that alone expresses the carrier's undertaking. See *Charleston etc. Ry.* v. *Moore* (1888) 80 Ga. 522, 5 S. E. 767. This theory is supported by the well-settled line of limited liability and agreed valuation cases, in which the shipper is held to his declaration. *Pierce Co.* v. *Wells Fargo & Co.* (1915) 236 U. S. 278, 35 Sup. Ct. 351; *Great Northern Ry.* v. *O'Connor* (1914) 232 U. S. 508, 34 Sup. Ct. 380; *Kansas City etc. Ry.* v. *Carl* (1913) 227 U. S. 639, 33 Sup. Ct. 391; *cf.* U. S. Comp. Stat., 1916, § 8604a. Besides, the volume and methods of transportation make an examination of the contents of the case received by the carrier impractical. See *Miller* v. *Hannibal etc. R. R.* (1882) 90 N. Y. 430, 435. Therefore, it is submitted that the shipper, not the carrier, ought to suffer for the misdescription in question. This would still leave the former his remedy against his agent. See *Reid* v. *American Exp. Co.* (1916) 241 U. S. 544, 36 Sup. Ct. 712.